

This message comments on the changes proposed to the Missouri Supreme Court Rules listed above that would allow Missouri lawyers to provide limited-scope legal services clients. My perspective is that of a lawyer who spends a significant amount of time practicing and teaching legal ethics, including teaching legal ethics at Washington University School of Law and serving on the Missouri Bar's Special Committee on Lawyer Advertising and Ethics 2005 Committee. Therefore, most of my comments relate to the ethics implications of the Proposed Rules. I also emphasize that these are my personal comments.

General Comments and Background.

Before turning to particular rules, let me offer three general comments. First, I commend the Missouri Supreme Court and Missouri Bar for trying to facilitate the provision of legal services to persons who do not qualify for public legal assistance but who also cannot afford full legal representation. This population has a great, unmet need for legal services. It is good to see the Bar and Court attempt to address such needs.

Second, while achieving such an objective necessarily requires some shift in the ethical rules that govern lawyers' behavior, I believe that this goal should be sought without impairing unnecessarily central principles that govern a lawyers' conduct. In particular, the proposed amendments should not alter pre-established principles that (a) lawyers owe clients fiduciary obligations, and there are no "second class" clients; (b) because a lawyer has greater mastery of the law, a lawyer should take steps to ensure that a client's interests are protected through the legal representation, even when that representation is limited; and (c) one of a lawyer's highest ethical obligations is a duty of candor to a presiding tribunal.

Third, while the Proposed Rules are plainly intended to help those of limited means, I anticipate the major use will likely be to allow law firms that represent entities to provide limited representations for the employees of such represented entities (for example, seeking dismissal of a employee party added to provide venue or prevent removal, or to represent an employee during a deposition). This alternate use of the amendments does not detract from the benefits they might provide, but the Committee should recognize that this alternate use will likely be quite common unless the amendments contain restrictions on application to persons without adequate financial means to otherwise obtain legal counsel.

With these principles in mind, I offer the following comments on particular proposed amendments:

Proposed Rule 4-1.2.

While this amendment should offer benefit, the language "gives written consent" is inconsistent with amended Missouri Supreme Court Rule 4 which will take effect on July 1, 2007. (I use "Amended Rule" to refer to Missouri Supreme Court Rule 4 after July 1, 2007.) After July 1, the Amended Rules will consistently require "informed consent" instead of just "consent" or (Missouri's current standard formulation) "consent after consultation." To adopt the proposed change after July 1, 2007, would be to suggest that only "consent" and not "informed consent" was required for a limited representation, clearly not the Committee's intention.

The language in the Amended Rules that seems closest to the intent of "written consent" is the written consent requirement contained in Amended Rule 4-1.8(a). Altering the language of Amended Rule 4-1.8(a) to fit the context of Proposed Rule 1.2, I suggest that the first sentence of the amendment read as follows: "A lawyer may limit the scope of [the] representation if the client *gives informed consent, in a writing signed by the client, to the essential terms of the representation and the lawyer's limited role.*"

All that having been said, consent in a writing signed by the client may be unnecessary and overly cumbersome for a limited representation, particularly if the limited representation merely involves the lawyer discussing an issue with a client over the telephone. Since the ethical rules set the floor of what is

required, and not what a lawyer generally should do, I suggest the Proposed Rule contain a lesser requirement, perhaps only “written consent, confirmed in writing.” This is the requirement contained in amended Rule 4-1.7(b) and other rules relating to waivers of conflicts of interest.

Also, while the proposed amendment apparently does not alter the comment, it is important that paragraph [5] of the Comment to the Amended Rule not be reduced. Retaining paragraph [5] will plainly advise the lawyer that a “client may not be asked to agree to representation so limited in scope as to violate Rule 4-1.1.”

Finally, in light of the reference to Rules 4-4.2 and 4-4.3 in the Proposed Rule, a statement should be added to the Comment of Proposed Rule 1.2 to remind lawyers that when dealing with a client of a lawyer who has given notice of a limited representation, the lawyer must take care not to obtain improper means to obtain evidence. I suggest the following be added to the Comment of Proposed Rule 1.2: “While a lawyer may communicate with a client regarding portions of a matter on which the client is not represented, the lawyer must avoid using such communications to invade improperly an attorney-client relationship of limited scope. See Rule 4.4.”

Proposed Rule 41.08.

Missouri law currently requires that a corporation may only appear through counsel. The amendments to Rule 41.08 should clarify whether this continues to be Missouri law, or whether limited representations would allow a corporate entity to appear before a tribunal through its nonlawyer representative. In other words, the Proposed Rule – probably in its Comment – should indicate whether a corporation may use counsel for certain appearances while using a nonlawyer agent to represent it in other aspects of a case.

Proposed Rule 43.01.

The proposed amendments to Proposed Rule 43.01 would allow service only on the party and not the lawyer when the lawyer has made only a Limited Entry of Appearance. This provision appears inconsistent with Missouri Supreme Court Rule 4-4.2 as well as with the proposed amendment (discussed earlier) to Proposed Rule 4-1.2. Consistent with the purpose of Rule 4-4.2 – which seeks to provide protection from ex parte contacts (and associated manipulation) when a person retains counsel – as well as the proposed amendment to Proposed Rule 4-1.2, Proposed Rule 43.01 should instead require service on the lawyer when the communication relates to the subject of the limited representation. I offer the following:

If an attorney has made a Limited Entry of Appearance, or is providing a limited representation, service of papers related to the scope of the Limited Entry of Appearance or limited representation shall be made on both the lawyer and the self-represented person, unless the lawyer providing the limited representation directs otherwise (including as provided in Rules 4-1.2 and 4-4.2, and not on the attorney. If an attorney makes a limited entry of appearance for an otherwise unrepresented person, service or delivery of papers is not authorized or required upon the attorney providing the limited representation. When a person is not represented fully in a matter, that person should receive service of all papers filed in the matter unless a contrary instruction is provided pursuant to Rule 4-1.2.

Proposed Rule 55.03.

A. The amendment to this rule that states a “pleading, motion or document prepared for an otherwise self-represented person may include a notation ‘Prepared with Assistance of Counsel’ on the document to

avoid misleading the court and other parties” should be changed to require such a disclosure when the lawyer’s assistance reaches a certain level. I suggest that the rule be modified to read:

The pleading, motion or document prepared for an otherwise self-represented person ~~may~~ **shall** include a notation ‘Prepared with Assistance of Counsel’ on the document **immediately after a pro se litigant’s signature** to avoid misleading the court and other parties **when the lawyer provided material assistance in drafting or revising the document.**

This amendment would make clear that such disclosure is not required when the lawyer merely provides case authority or the like; however, when the lawyer provides significant assistance in drafting or revising the pleading, disclosure should occur. Such disclosure is consistent with a lawyer’s duty of candor to a court under Rule 4-3.3. My proposed change continues the apparent intent of Proposed Rule 55.03, which is to allow the lawyer to participate anonymously when such participation is relatively minor, and thus preserves the benefit a pro se litigant would receive.

Should my suggested change or a similar amendment not be adopted, the lack of guidance in the Rule regarding when disclosure should occur would essentially render disclosure of a lawyer’s participation a tactical tool. A client would not be required to disclose a lawyer’s assistance even when the lawyer did virtually all the work on the pleading. Instead, the client could choose to include the disclosure apparently as he or she deemed appropriate, and would likely do so when disclosure of assistance is deemed likely to provide the pro se litigant with some tactical advantage.

Finally, my proposed amendment does not impose the obligation only on the lawyer, who may not be in the position to insist upon the inclusion of the disclosure required by my amendment.

B. In the proposed amendment, the words “if applicable” are not clearly situated when they are set off by commas in the middle of a serial list of items connected by commas. It would be better to place the words “if applicable” in parenthesis.

C. Proposed Rule 55.03 or a comment thereto should make clear the relationship between a lawyer’s ability to rely on a statement of facts supplied by a self-represented person and the lawyer’s duty of candor to the tribunal. Specifically, I suggest that a statement be added to the Comment which states, “Nothing in this Rule reduces a lawyer’s obligation of candor to a tribunal. See Mo. S. Ct. R. 4-3.3.”

Proposed Rule 88.09

I offer no suggestions to the amendments proposed for this Proposed Rule.

Thank you very much for soliciting comments on the proposed amendments. Please feel free to contact me at (314) 588-7005 if you have any questions or comments on these or other possible changes to the Missouri Supreme Court Rules.

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